

LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1949 / 1950

No. 556 B

JOINT ANTI-FASCIST REFUGEE COMMITTEE,
AN UNINCORPORATED ASSOCIATION, PETI-
TIONER,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL OF
THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 25, 1950.

CERTIORARI GRANTED MARCH 13, 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 556

JOINT ANTI-FASCIST REFUGEE COMMITTEE,
AN UNINCORPORATED ASSOCIATION, PETI-
TIONER,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL OF
THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. A., District of Columbia Circuit	1	1
Joint appendix to briefs of parties	1	1
Caption	1	1
Complaint	2	1
Motion for preliminary injunction	11	9
Marshal's return	13	10
Notice of hearing	13	11
Affidavit of Dr. Edward K. Barsky	14	11
Affidavit of Helen R. Bryan	26	21
Defendants' motion to dismiss complaint	34	28
Order granting motion to dismiss	35	28
Opinion, Proctor, J.	36	29
Dissenting opinion, Edgerton, J.	41	36
Judgment	49	49
Order substituting party appellee	50	50
Recital as to filing of petition for rehearing	50	50
Order denying petition for rehearing	51	51
Designation of record	51	51
Clerk's certificate	53	53
Order-extending time to file petition for certiorari	53	53
Order allowing certiorari	54	54

[fol. 1]

**IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

No. 10002.

JOINT ANTI-FASCIST REFUGEE COMMITTEE, an unincorporated association, Appellant,

v.

TOM C. CLARK, Attorney General of the United States,
Seth W. Richardson, Chairman of the Loyalty Review Board of the United States Civil Service Commission, et al., Appellees.

Appeal from the District Court of the United States for the District of Columbia.

Joint Appendix

[fol. 2] **IN UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA**

Civil Action No. 561-48

JOINT ANTI-FASCIST REFUGEE COMMITTEE, an unincorporated association, located at 192 Lexington Avenue, New York City, New York, Plaintiff,

against

TOM C. CLARK, Attorney General of the United States,
Seth W. Richardson, Chairman of the Loyalty Review Board of the United States Civil Service Commission,
Harry A. Bigelow, **John Harlan Amen**, **George W. Alger**, **Aaron J. Brumbaugh**, **John Kirkland Clark**, **Harry Colmery**, **Tom J. Davis**, **Burton L. French**, **Meta Glass**, **Earl Harrison**, **Garret Hoag**, **Wilbur LaRoe, Jr.**, **Arthur F. MacMahon**, **Charles E. Merriam**, **Henry Parkman, Jr.**, **Charles Sawyer**, **Murray Seansonood**, **Harry L. Shattuck**, **Mrs. Harper Sibley**, **Paul M. Hebert**, **Lawrence T. Lee**, members of the Loyalty Review Board of the United States Civil Service Commission, Defendants.

COMPLAINT—Filed February 10, 1948

The plaintiff by its attorneys Rogge, Fabricant, Gordon & Goldman and Wolf, Popper, Ross & Wolf

respectfully shows to this Court and alleges for its complaint:

As a First Separate and Distinct Claim

First: This is an action for a declaratory judgment and for equitable relief arising under the Constitution and laws of the United States and involves a matter in controversy [fol. 3] which exceeds the sum or value of \$3,000.00, exclusive of interest and costs.

Second: The jurisdiction of the Court in this action arises under Sections 11-301, 11-305 and 11-306 of the District of Columbia * * * under Section 24 of the United States Judicial Code (28 U. S. C. A. * * * Section 274d of the United States Judicial Code (28 U. S. C. A. § 400), and Section 380a of Title 28 of the United States Code (28 U. S. C. A. § 380a).

Third: Defendant Tom C. Clark is the Attorney General of the United States and is found within the District of Columbia.

Fourth: Defendant Seth W. Richardson is the Chairman of the Loyalty Review Board of the Civil Service Commission; and defendants Harry A. Bigelow, John Harlan Amen, George W. Alger, Aaron J. Brumbaugh, John Kirkland Clark, Harry Colmery, Tom J. Davis, Burton L. French, Meta Glass, Earl Harrison, Garret Hoag, Wilbur LaRoe, Jr., Arthur W. MacMahon, Charles E. Merriam, Henry Parkman, Jr., Charles Sawyer, Murray Seasongood, Harry L. Shattuck, Mrs. Harper Sibley, Paul M. Hebert, and Lawrence T. Lee are the other members of that Board. The Loyalty Review Board is located in the District of Columbia and each of the members thereof is to be found within the District of Columbia.

Fifth: Plaintiff, an unincorporated association located in the City and State of New York, is a charitable organization engaged in relief work. The plaintiff carried on its relief activities from on or about March 11, 1942 to on or about May 14, 1946 under license #539, issued by the President's War Relief Control Board, and thereafter, since the termination of the President's War Relief Control Board on or about May 14, 1946 by Executive Order #9723, the plaintiff has voluntarily submitted its program, budgets and audits for inspection by the

Advisory Committee on Voluntary Foreign Aid of the United States Government.

[fol. 4] Sixth: Since its inception on or about February 24, 1942, the plaintiff, through voluntary contributions, has raised funds for and disbursed the funds thus raised for the benefit of those anti-fascist refugees who had fought with and assisted the duly constituted government of Spain against the overthrow of that government, by Francisco Franco and others, through force and violence. The aims and purposes of the plaintiff organization are to raise, administer and distribute funds for the relief, and rehabilitation of Spanish Republicans in exile and other anti-fascist refugees who fought in the war against Franco. Before the end of the war in Europe, this relief consisted of: (1) the release and assistance of those of the aforesaid refugees who were in concentration camps in Vichy France, North Africa and other countries; (2) transportation and asylum for those of the aforesaid refugees in flight; (3) direct relief and aid, to those of the aforesaid refugees requiring help, through the Red Cross and other international agencies. At the present time, the Joint Anti-Fascist Refugee Committee relief work is principally devoted to aiding those Spanish Republican refugees, and other anti-fascist refugees who fought against Franco, located in France and Mexico.

Seventh: Pursuant to its aims and purposes, the plaintiff organization has, from its inception in 1942 through the end of 1947, disbursed a total of \$1,011,448.00 in cash and \$217,903.00 in kind for the relief of antifascist refugees and their families. The relief included money, food, shelter, educational facilities, medical treatment and supplies, and clothing to recipients in France, North Africa, the Dominican Republic, Portugal, Switzerland, Cuba, Venezuela, Mexico, the Netherlands, Spain, and the United States.

Eighth: By means of voluntary and paid assistance, the plaintiff organization has raised funds from contributors at social affairs, rallies, meetings, dinners, theatre parties, etc. In order to carry on the aforesaid work, plaintiff [fol. 5] has built up and is dependent upon the continued good will of the people of the United States and upon the continued maintenance of its reputation of engaging in relief work for the benefit of anti-fascist refugees.

Ninth: The acts of the defendants as hereinafter set forth have seriously and irreparably damaged and impaired and will continue to seriously and irreparably damage and impair the favorable reputation, moral support, and good will of the American people enjoyed by plaintiff and necessary for the continuance by the plaintiff of its charitable activities.

Tenth: On or about March 25, 1947, the President of the United States issued Executive Order #9835, published at page 1935 of volume 12 of the Federal Register.

Eleventh: Executive Order #9835 recites that it was issued by the President:

" . . . by virtue of the authority vested in me by the Constitution and the statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and Section 9A of the act approved August 2, 1939 (18 U. S. C. 61 i), and as President and Chief Executive of the United States . . . "

Twelfth: Said Executive Order provided, generally, for "loyalty investigations" of civilian employees in the Executive Branch of the Federal Government and of applicants for civil employment in the Executive Branch of the Federal Government.

Thirteenth: Part III, section 1 of said Executive Order #9835 provided for the establishment of a Civil Service Commission Loyalty Review Board and pursuant thereto such a Board was established and the chairman and members thereof appointed by the President of the United States on or about November 8, 1947.

Fourteenth: Part V, section 2(f) of said Executive Order #9835 specified that among the "activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty" is the applicant's or employee's "membership in, affiliation with, or sympathetic association with any foreign or domestic organization, association, movement, group, or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution

of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

Fifteenth: Part III, section 3 of said Executive Order #9835 further provided:

"3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group, or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies."

Sixteenth: In a letter dated November 24, 1947 from the defendant Tom C. Clark to the defendant Seth W. Richardson, purportedly submitted pursuant to Part III, section 3 of Executive Order #9835, ninety organizations (sometimes hereinafter referred to as "designated organizations") including the plaintiff, were listed as organizations named by the Department of Justice as "subversive" although the plaintiff never received any notice or hearing with respect to the aforesaid designation.

[fol. 7] Seventeenth: On or about December 4, 1947, the defendant Seth W. Richardson sent the aforesaid letter together with the list of designated organizations to the local departments and agencies which assist in the administration of Executive Order #9835 and on or about the same time the aforesaid letter was released to and widely publicized by the public press.

Eighteenth: Upon information and belief, the designation of the plaintiff by the defendant Tom C. Clark and the dissemination of said designation through the public press by the defendant Seth W. Richardson has caused and will continue to cause plaintiff to suffer loss of business and patronage since as a result of the aforesaid acts of the defendants:

1) The United States Bureau of Internal Revenue has deprived the plaintiff of its status as a tax exempt organization;

2) Many contributors, especially present and prospective civil servants, have instructed the plaintiff to strike their names from the plaintiff's list of contributors and have either reduced the amount of or discontinued entirely their contributions;

3) Many potential contributors, especially present and prospective civil servants have declined and will continue to decline to make contributions to the plaintiff organization;

4) Plaintiff has been refused licenses required of organizations soliciting funds;

5) Plaintiff has been hampered and will continue to be hampered in obtaining the use of private homes or in renting halls and similar places for the social affairs, rallies, meetings, dinners, theatre parties, etc., necessary to the fund-raising activities of the plaintiff;

6) Reservations obtained by the plaintiff for halls and similar places for the purpose of conducting social affairs, rallies, meetings, dinners, theatres, etc., necessary to the fund-raising activities of the plaintiff have been and will continue to be cancelled;

[fol. 8] 7) Many prominent speakers, entertainers, etc., have refused and will continue to refuse to participate in the social affairs, rallies, meetings, dinners, theatre parties, etc., necessary to the fund-raising activities of the plaintiff;

8) Voluntary members and other participants in the activities of the plaintiff organization have been vilified and subjected to public shame, disgrace, ridicule and obloquy thereby inflicting upon them economic injury and discouraging some of said members and participants from continuing in the activities of the plaintiff organization.

Nineteenth: The aforesaid actions taken by the defendants Tom C. Clark and Seth W. Richardson were unauthorized and without warrant in law and amount to a deprivation of the rights of the plaintiff in violation of the Constitution of the United States.

Twentieth: Section 9A of the Hatch Act enacted August 2, 1939 (53 Stat. 1148, 18 U. S. C. A. § 61 i), is unconstitutional and void as applied herein by Executive Order #9835, for the following reasons:

1) It is repugnant to the Constitution of the United States as a deprivation of freedom of speech, of the press, and of assembly and association in violation of the First Amendment.

2) It is repugnant to the Constitution of the United States as a deprivation of the fundamental rights of the people of the United States reserved to the people of the United States by the Ninth and Tenth Amendments.

3) It is repugnant to the Constitution of the United States as a deprivation of liberty and property without due process of law in violation of the Fifth Amendment.

Twenty-first: Executive Order #9835 on its face and as construed and applied herein by the defendants exceeds the powers vested in the President by the United States Constitution and is null and void for the following reasons:

1) It is repugnant to the Constitution of the United States and a deprivation of freedom of speech, of the press, and of assembly and association in violation of the First Amendment and the Fifth Amendment.

[fol. 9] 2) It is repugnant to the Constitution of the United States as a deprivation of the fundamental rights of the people of the United States reserved to the people of the United States by the Ninth and Tenth Amendments.

3) It is repugnant to the Constitution of the United States as a deprivation of liberty and property without due process of law in violation of the Fifth Amendment.

Twenty-Second: There exists between plaintiff and the defendants herein an actual controversy, and plaintiff has instituted this action for the purpose, among others, of having the aforesaid Executive Order #9835 declared unconstitutional as hereinbefore more particularly set forth.

Twenty-Third: A delay in ascertaining and determining the rights of plaintiff will result in further serious and irreparable loss and damage to it, and this loss and damage are and will be irremedial unless relief is granted by this

Court. There is no other remedy afforded by law or statute against the illegal acts and conduct of the defendants, save the equity powers of this Court, and unless the relief prayed for is granted, plaintiff will suffer irreparable loss and damage.

Twenty-Fourth: By reason of the premises plaintiff is entitled to relief against the defendants under the Federal Declaratory Judgment Act of June 14, 1934, Title 28, U. S. Code, Section 400, and under the Constitution of the United States.

As a Second Separate and Distinct Claim

Twenty-Fifth: Repeats and realleges the allegations contained in paragraphs marked "First" through "Twenty-Third" hereof with the same force and effect as if set forth at length herein.

Twenty-Sixth: The damage to plaintiff above described will continue unless and until the defendants are enjoined from publicizing and sending to departments and agencies in the Executive Branch of the Federal Government the [fol. 10] name of plaintiff as a designated organization, and are directed to remove plaintiff's name from the list already circulated and issued, and are directed further to make known this action in the same manner in which they made known the inclusion of plaintiff's name on the above mentioned list, and are directed further to take no action which may be based upon the inclusion of the plaintiff's name in the aforesaid list.

Twenty-Seventh: The plaintiff has no adequate remedy at law.

Wherefore, plaintiff prays that a three judge court be convened, pursuant to Title 28, U. S. C. A., Section 380a, and for the following relief:

- 1) That Section 9A of the Hatch Act as applied by Executive Order #9835 be declared unconstitutional.
- 2) That Executive Order #9835 be declared unconstitutional.
3. That the defendants and their officers, agents, and employees be enjoined from designating, declaring, circulating or publicizing the name of plaintiff as a designated

organization; and that the defendants and their officers, agents and employees be directed to remove the name of plaintiff from the list of designated organizations already circulated, issued and published, and to make a public statement of this removal; and that the defendants and their officers, agents, and employees be directed to take no action which may be based upon the inclusion of the plaintiff's name in the list of designated organizations.

4) That pending the final hearing and determination of this complaint upon its merits, the Court issue a preliminary injunction, restraining the defendants and their officers, agents, and employees from designating, declaring, circulating and publicizing the name of plaintiff as a designated organization; directing the defendants and their officers, agents and employees to remove the name of plaintiff from the list of designated organizations already circulated, issued and published, and to make a public statement [fol. 11] of this removal; and directing the defendants and their officers, agents and employees to take no action upon the basis of the inclusion of the plaintiff's name in the list of designated organizations.

5) For such other and further relief as this Court may deem proper.

O. John Rogge, Rogge, Fabricant, Gordon & Goldman, 401 Broadway, New York City 13, N. Y., 1700 Eye Street; N. W., Washington 6 D. C.; Wolf, Popper, Ross & Wolf, 160 Broadway, New York City 7, N. Y., 902 20th Street, N. W., Washington, D. C., Attorneys for Plaintiff.

[Verification of Dr. Edward K. Barsky omitted.]

IN UNITED STATES DISTRICT COURT

MOTION FOR PRELIMINARY INJUNCTION—Filed February 10, 1948.

The plaintiff moves the court for a preliminary injunction against all the defendants herein, their agents, servants, employees and attorneys and all persons in active concert

and participation with them, pending the final hearing and determination of this action:

1) restraining the defendants and their officers, agents, and employees from designating, declaring circulating and publicizing the name of plaintiff as a designated organization;

2) directing the defendants and their officers, agents and employees to remove the name of plaintiff from the list of [fol. 12] designated organizations already circulated, issued and published, and to make a public statement of this removal;

3) directing the defendants and their officers, agents, and employees to take no action upon the basis of the inclusion of the plaintiff's name in the list of designated organizations; and

4) for such other and further relief as this Court may deem proper.

on the grounds that:

a) the defendants have performed and will perform acts which, unless restrained and directed by this court as aforesaid, will result in irreparable injury, loss and damage to the plaintiff, as more particularly appears in the complaint verified by Dr. Edward K. Barsky and in the affidavits of Dr. Edward K. Barsky and Helen Bryan, which are attached hereto; and

b) the issuance of a preliminary injunction herein will not cause undue inconvenience to the defendants but will prevent irreparable injury to the plaintiff.

Dated: New York, N. Y., February 10, 1948.

Rogge, Fabricant, Gordon & Goldman, by O. John Rogge, 401 Broadway, New York City 13, N. Y., 1700 Eye Street, N. W., Washington 6, D. C.; Wolf, Popper, Ross & Wolf, 160 Broadway, New York City 7, N. Y., 902 20th Street, N. W., Washington, D. C., Attorneys for Plaintiff.

[fol. 13]

U. S. MARSHAL'S RETURN

Served copies of written Motion on Seth W. Richardson, Chairman, by personally serving Wm. Hull, Exec. Asst.,

2-12-48; District Atty. Geo. M. Fay personally 2-10-48; Served the Atty. General Tom Clark, by registered mail (receipt #323053) 2-18-48.

W. Bruce Matthews, U. S. Marshal in and for the District of Columbia, by E. J. McClay, Deputy U. S. Marshal.

NOTICE

To: ———, Washington, D. C.

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at the United States District Court House for the District of Columbia on the 19th day of February, 1948 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Rogge, Fabricant, Gordon & Goldman, by O. John Rogge, 401 Broadway, New York City 13, N. Y., 1700 Eye Street, N. W., Washington 6, D. C.; Wolf, Popper, Ross & Wolf, 160 Broadway, New York City 7, N. Y., 902 20th Street, N. W., Washington, D. C., Attorneys for Plaintiff.

[fol. 14]

U. S. MARSHAL'S RETURN

Served copies of written Notice on within named Seth W. Richardson, Chairman, by personally serving Wm. Hull, Exec. Asst., 2-12-48; District Atty. Geo. M. Fay personally 2-10-48; Served the Atty. General Tom C. Clark by registered mail (receipt # 323053) on 2-18-48.

W. Bruce Matthews, U. S. Marshal in and for the District of Columbia, by E. J. McClay, Deputy U. S. Marshal.

• • • • •

AFFIDAVIT OF DR. EDWARD K. BARSKY

STATE OF NEW YORK,

County of New York, ss:

Dr. Edward K. Barsky, being duly sworn, deposes and says:

I am the chairman of the Executive Board of the Joint Anti-Fascist Refugee Committee, and submit this affidavit in support of the motion of the Joint Anti-Fascist Refugee

Committee for a preliminary injunction in the above-entitled matter.

The Joint Anti-Fascist Refugee Committee is a relief organization established in February, 1942, and is comprised of a national office (referred to as the Executive Board, located in New York City and local chapters in New York City, Boston, Philadelphia, Chicago, Seattle, Los Angeles, Berkeley and San Francisco. Miss Helen R. Bryan is the National Executive Secretary and is authorized by the constitution of the Joint Anti-Fascist Refugee Committee to handle the administrative aspects of the organization.

[fol. 15] The Joint Anti-Fascist Refugee Committee was organized to raise, administer and distribute funds for the relief and rehabilitation of Spanish Republicans in exile and other anti-fascist refugees who fought Franco. Before the end of the war in Europe the Committee worked for the release and assistance of the above-described refugees held in concentration camps; the transportation and asylum of those of the above-mentioned refugees who were in flight; and to provide direct relief to the above-mentioned refugees through the Red Cross and other international agencies. With the end of the war in Europe, the Committee turned its attention principally to providing money, food, clothing, medicine and other relief to Spanish Republican and other anti-Franco refugees in France and Mexico.

For the achievement of these objectives, the Joint Anti-Fascist Refugee Committee has conducted very extensive fund-raising campaigns. Licensed by the President's War Relief Control Board until the expiration of that Board in May of 1946, the Joint Anti-Fascist Refugee Committee has held parties, rallies, meetings, dinners, dance recitals, theatre parties, benefits, etc., to raise funds for anti-fascist refugees. And, consequently, the Joint Anti-Fascist Refugee Committee has been enabled to provide, from its inception in 1942 through the end of 1947, a total of \$1,229,351.00 worth of relief.

The scope of the relief work done by the Joint Anti-Fascist Refugee Committee from 1942 to the present has been so considerable that only an outline of that work will be presented:

1. Relief in the Dominican Republic

In 1943 Dr. Barney N. Morgan, Superintendent of the Board for Christian Work in Santo Domingo and Director

of the American Hospital in Ciudad Trujillo, formally called upon this organization to request immediate aid for the Spanish Republicans in the Dominican Republic. In his presentation to us he stated that unless a minimum of 200 [fol. 16] Spanish refugees were aided he had no guarantee that they could live. He stated that many of them were still suffering from wounds contracted during the Spanish civil war; that a very high percentage of them had tuberculosis and others would contract it in the near future; and that anemia was at a high point. The Spanish children were so undernourished as to be in grave danger of death. The Government of the Dominican Republic was unable to provide sufficient economic opportunities for those Spanish refugees who were able to work. In general, the living conditions of the Spanish Republicans in the Dominican Republic were far below the low standards which prevailed in that country. In addition to illness, unemployment, lack of food and shelter, the climatic conditions of the country only served to accentuate the undernourishment and illness existing among the Spanish refugee group. The farm projects which they attempted failed due to lack of support.

On the basis of Dr. Morgan's presentation, a project was accepted to send aid for the Spanish refugees in the Dominican Republic to be administered by him. The Joint Anti-Fascist Refugee Committee sent him, for this purpose, a total of \$19,000 from March, 1943 through December, 1945.

For over three years, funds were sent regularly which aided approximately 50 Spanish refugees and their families. Payments up to \$150.00 a month were obtained by those recipients of our relief. It became increasingly clear that some of these individuals had to be transported to Mexico where physical and economic conditions would be much more favorable for them. Therefore, in addition to the direct relief in Santo Domingo, this Committee has transported approximately 85 refugees from Santo Domingo to Mexico.

2. Relief in North Africa

Shortly after the liberation of North Africa by our troops, it became apparent that the needs among Spanish refugees [fol. 17] in North Africa were acute. William D. Weatherford of the American Friends Service Committee stated in April 1945 that there were approximately 9000 Spanish Republicans in North Africa. Some were Spanish Republi-

cans who had fled to North Africa from Spain; others had been shipped from France to North Africa by the Vichy French government for the purpose of cheap labor. That was in 1941. The already mistreated, enfeebled and sick Spanish refugees transported from France were put to work building the Trans-Sahara Railroad, and performing other slave labor under confinement, for the benefit of the Vichy forces. The lack of water, insufficient food, clothing and shelter, extremes of heat and cold, and brutal punishment to which these refugees were subjected, caused an unestimated number of deaths and permanently impaired the health of all the survivors.

After the Allied invasion of North Africa, Spanish Republicans interned in camps were released. Thereafter an organization was formed by the liberated Spanish refugees for their mutual aid. At that time there was considerable employment for these Spaniards in construction and repair work for the Allied Armies so that the relatively able-bodied were in a position to help their incapacitated compatriots.

With the help of the American Friends Service Committee and UNRRA officials in North Africa, this organization was transformed into *Amicales d'entre aide des refugios espagnols*. *Amicales* were created in Oran, Algiers, Casablanca and Tunis. The French authorities quickly recognized these *Amicales* and authorized the *Amicales* to dispense relief without political or religious discrimination among the Spanish refugee communities.

In October, 1943, the Joint Anti-Fascist Refugee Committee began sending under a Treasury Department license, regular sums of money to Dr. Kendall Kimberland, Director for the American Friends Service Committee in North Africa, for the use of the *Amicales*. Following the closing [fol. 18] of the American Friends Service Committee office, the funds were sent, upon the recommendation of the American Friends Service Committee, directly to Victoriano Provedo Maestro, Treasurer of the *Amicales* of Algiers. The Committee sent \$5,000.00 a month during October, November and December in 1943 for relief in North Africa; \$42,500 in 1944; and \$25,000 in 1945—a total of \$82,500. Thousands of individuals were thus aided with our money. This aid has taken the form of financial assistance to the physically disabled, the old people and individuals still suffering from injuries incurred in the Spanish civil war. The Joint Anti-Fascist Refugee Committee also provided

for the economic rehabilitation of Spanish refugees in North Africa.

3. Relief in Portugal

The distribution of funds for the medical care and relief among the Spanish refugees in Portugal has been through the medium of the Unitarian Service Committee. The number of Spanish refugees in and around Lisbon varied, but generally a minimum of 300 urgently required medical care, food and clothing.

On one occasion, in 1946, the Joint Anti-Fascist Refugee Committee collaborated with the Unitarian Service Committee to transport and settle more than 30 Spanish refugees from Lisbon to Mexico. The Unitarian Service Committee secured visas for these refugees and was responsible for the transportation expenses from Lisbon to Mexico; the Joint Anti-Fascist Refugee Committee was responsible for their rehabilitation needs after they arrived in Mexico.

4. Relief in Switzerland

As a result of the Nazi terror in France, many Spanish refugees fled French concentration camps. Some of them were caught, but others found their way safely into Switzerland. The Joint Anti-Fascist Refugee Committee sent money regularly each month through the Unitarian Service [fol. 19] Committee to assist these refugees. The Swiss Government and the Swiss people were most generous in their aid, but required the assistance of private agencies. The Joint Anti-Fascist Refugee Committee sent money to Switzerland which was used to supply food, medicine, money, clothing, etc., for Spanish refugees located there.

5. Relief in Cuba, Venezuela and the Netherlands

Small amounts were sent to Spanish Republicans, and other refugees who had fought Franco, in Cuba, Venezuela, and the Netherlands. Artificial limbs and medical assistance were purchased with the money sent by the Committee.

6. Relief in France

Following the liberation of France, in which the Spanish Maquis played an important and heroic part, saving the

lives of many American soldiers, it was learned that there were 150,000 to 200,000 Spanish Republican refugees in France. As a result of the war years, followed by years of concentration camps, prisons and slave labor, the health of many of these men, women and children had been seriously, if not premanently undermined and help for them was imperative.

Officials of the Unitarian Service Committee estimated that soon after the liberation of France, there were a minimum of 40,000 Spanish refugees in the vicinity of Toulouse. Hundreds of families located there had suffered losses by death or had among them wounded and mutilated men. The situation of the children was most alarming. Practically all the children were undersized and there was a high rate of tuberculosis and malnutrition among them.

A large group of Spanish refugees were located in and around Paris. Many were blind and limbless; all were in bad health. Large families were living in single rooms and [fol. 20] lacked clothing and shoes. Children were unable to go to school for lack of clothing.

There were a minimum of 5,000 Spanish refugees in the vicinity of Marseilles suffering from exposure, illness and inadequate diet.

The whole problem of care for the Spanish refugees was increased by the return to France of the Spanish refugees who had spent months and years in the Nazi prisons. These men were walking skeletons and created an acute problem of immediate medical care.

Many of the Spaniards in France were mutilated because of the war in Spain and in France. The number totaled approximately 3,500. Some of these were totally incapacitated, either blind or lacking both arms and both legs. Their medical and surgical needs had to be met after many years of neglect; vocational training had to be provided for them.

In March, 1945, we started our program of aid for the Spanish Republicans in France. The Committee established and maintained two hospitals for the Spanish Republicans, one in Toulouse and one in Varsovie, in France. Additional funds have been used to help support the families, the heads of which had been returned to Franco Spain or died in the past few years. Aid was also given to the children of the Spanish Republicans.

We have received many cablegrams from Paris requesting immediate clothing. One cablegram stated that the "situation of the Spanish refugees increasingly desperate. Hundreds without anything but last vestiges garments pathetically inadequate for approaching fuelless winter cold slopes Icy Pyrenees infants wrapped in newspaper. General resistance lowered all kinds throat lung other ailments rampant. Rush clothing stop Clothing is life stop. Please relay this message Unitarian Boston." In response to this appeal we began a clothing collection for the refugees in [fol. 21] France and in the short period from November 12 to December 31, 1945, 36,445 lbs. of clothing were turned over to the Unitarian Service Committee for shipment to France. Clothing collection continued at approximately the same tempo.

The Committee presently maintains and supports the Walter B. Cannon Memorial Hospital at Varsovie. This hospital not only cares for the hospitalization needs of Spanish refugees, but also maintains an out-patient clinic which cares for 3,000 patients a month. Further, the Committee sustains a convalescent home at Meillon. And for the welfare of the children of Spanish Republicans in France, the Committee participates in the San Goins Home.

These various activities of the Committee are current, and the Committee intends to continue them so long as Spanish refugees require aid. In order to do so, it is necessary to make regularly monthly payments to the institutions concerned. At the present time, the Joint Anti-Fascist Refugee Committee is committed to regular monthly remittances of \$5,400. These commitments must be met if the Committee's relief work in France is to be effectual.

7. Relief in Mexico

Many of the Spanish refugees are located in Mexico. As Spanish Republicans elsewhere, many are suffering from the wounds and illnesses incurred in Spain from 1936 to 1939. Many of the families are without their husbands or fathers. The Spanish refugee group in Mexico has, on the whole, adapted itself well to its temporary home in Mexico. However, the demand and need for help among these refugees is still great.

The relief work of the Committee has been performed through its agency in Mexico, the Fondo de Ayuda Economica a Los Refugiados Antifascistas Europeos En Mexico, known as FAERAE. The sole purpose of this agency is to [fol. 22] distribute school, hospital and direct relief for the Committee in Mexico.

One aspect of the relief work of the Committee in Mexico is a scholarship plan for Spanish refugee students in Mexico City, from nursery school through college in the various schools and colleges of Mexico. A large number of the students are being educated in the Luis Vives Institute. This school has been operated by Mexican and Spanish teachers and attended by Mexican and refugee children. The school meets the standards of the Board of Education of Mexico and enjoys a high academic standing in Mexico City. At any given time, between 100 and 200 refugee children attend this school. Scholarships in many instances have provided lunch and transportation to and from the school.

To meet the critical health situation of Spanish refugees in Mexico, the Joint Anti-Fascist Refugee Committee decided to create the Edward K. Barsky Hospital which now has a high standing among Mexican doctors. The staff of the hospital is composed of outstanding Spanish Republican doctors who consult regularly with the Mexican physicians.

The Hospital services the medical and surgical needs of the community; maintains an out-patient clinic, a well equipped maternity ward and laboratory facilities.

In addition we supply direct relief. This aid provides for individual needs, exclusive of the hospital, such as dental work care, convalescent care, economic aid, and other needs that may arise.

8. Relief in the United States

The Joint Anti-Fascist Refugee Committee has also extended relief to those refugees who fought Franco and who had been stranded within the United States. A number of these were in transit to Mexico. The Committee provided some of these refugees with direct relief such as medical care, hospitalization, food, clothing, relief grants, etc.

[fol. 23] 9. Relief in Spain

Through the American Friends Service Committee operating in Spain, we sent funds for the relief of members of the International Volunteers, most of whom were incarcerated in the prison of Miranda de Ebro. Practically all of these International Volunteers are now out of Spain, but while we were aiding them through the Quakers, this aid was in the form of food, clothing and medical supplies.

At the nub of all the above-described activities of the Joint Anti-Fascist Refugee Committee is its fund-raising. The welfare, and the very sustenance of many anti-fascist refugees depends upon the contributions of Americans. The good-will of the American public towards the Joint Anti-Fascist Refugee Committee is the life blood of those refugees. The relief work done by the Joint Anti-Fascist Refugee Committee in the past cannot continue if its fund-raising is impaired or frustrated. Accordingly, the organization is compelled to bring this action and seek the temporary injunctive relief requested, for the effect of Executive Order #9835 is to diminish and possibly destroy our ability to raise funds and thereby diminish and possibly destroy the relief we provide for the refugee-beneficiaries of our activities.

Executive Order #9835, and the subsequent designation of the Joint Anti-Fascist Refugee Committee by the Attorney General which was disseminated by the public press, threaten to destroy the good-will of the American public which the Joint Anti-Fascist Refugee Committee has cultivated for the five years of its existence. Although the list of designated organizations was publicized only about two months ago, it has already seriously impaired the activities of the Joint Anti-Fascist Refugee Committee. Not only contributors, but also the personnel and facilities essential for our fund-raising have been affected by the public disapprobation which attaches to an organization thus designated by the Attorney General. As appears from Miss Bryan's affidavit which is submitted together with [fol. 24] this affidavit in support of the plaintiff's motion, contributors of many years standing, particularly present or prospective civil servants, frightened of "association" of "affiliation" with a designated organization, have instructed us to take their names from our mailing and calling lists and have either ceased contributing to

the Joint Anti-Fascist Refugee Committee or have substantially reduced their contributions; other persons who would have been inclined to contribute to the relief of refugees from Franco Spain have, through fear of economic and social consequences or through distrust of an organization designated by the Attorney General, declined to make such a contribution; the pressure created by the acts of the defendants has caused the Joint Anti-Fascist Refugee Committee to lose the assistance of valuable voluntary workers; and the public hysteria arising out of the defendants' acts has deprived the Joint Anti-Fascist Refugee Committee of access to essential facilities such as meeting places, private homes, licenses, etc. The publicly-announced decision of the Bureau of Internal Revenue to deprive the Joint Anti-Fascist Refugee Committee of its tax exempt status, which was released to the public press for February 3, 1948, (see Exhibit "1" attached to affidavit of Helen R. Bryan) will undoubtedly close to us many sources of contributions because many contributors may fear that donations to the Joint Anti-Fascist Refugee Committee will be non-deductible for tax purposes.

The experience of the Joint Anti-Fascist Refugee Committee since December 4, 1947, indicates that Executive Order #9835 provides the Attorney General with the arbitrary and discretionary power to destroy an organization. Without affording the Joint Anti-Fascist Refugee Committee any opportunity to be heard, or to appeal or otherwise review his judgment, the Attorney General is empowered by Executive Order #9835 to characterize our organization as disloyal and thereby undermine the public support without which the Joint Anti-Fascist Refugee Committee cannot survive. The grant of such power to a public official [fol. 25] violates the civil liberties which I had thought to be guaranteed by the First Amendment. The concept that some public official can act as a judge of loyalty is a new concept in American history and a departure from all of the traditions we have been taught to revere and cherish. My attorneys inform me that such action by the Attorney General is also violative of the powers reserved to the American people by the Ninth and Tenth Amendments, and that the procedures and standards involved violate the Fifth Amendment.

The unlawful actions of the defendants have seriously impaired and interfered with the activities and existence of

the Joint Anti-Fascist Refugee Committee. The damage caused has been substantial and irreparable, and unless injunctive relief is obtained the resultant damage to the Joint Anti-Fascist Refugee Committee will continue to be substantial and irreparable. Moreover, no administrative review is available nor would an action at law be adequate. Only this Court, in the exercise of its equity powers, can protect the constitutional rights of the Joint Anti-Fascist Refugee Committee which have been jeopardized by the unlawful actions of the defendants. That protection is required immediately for unless defendants are enjoined, as prayed for in the complaint and the motion for a preliminary injunction, during the pendency of this action, the Joint Anti-Fascist Refugee Committee will suffer irreparable harm.

Edward K. Barsky.

Sworn to before me this 9th day of February, 1948.
David Berger, Notary Public, State of New York,
residing in Westchester County. Cert. filed in
N. Y. Co. No. 791, Reg. No. 634-B-9. Commission
expires March 30, 1948.

[fol. 26] AFFIDAVIT OF HELEN R. BRYAN

STATE OF NEW YORK,
County of New York, ss:

Helen R. Bryan, being duly sworn, deposes and says:

I am the National Executive Secretary of the Joint Anti-Fascist Refugee Committee and submit this affidavit in support of the motion of the Joint Anti-Fascist Refugee Committee for a preliminary injunction in the above entitled matter.

As National Executive Secretary I have had a first-hand opportunity to observe the effects of the publication of the Attorney General's list of designated organizations. It has seriously impaired the fund-raising activities of the Joint Anti-Fascist Refugee Committee. I have heard and seen contributors insist that their names be taken from our mailing lists; volunteers indicate their concern as to whether they would continue to work for the organization; the reluctance of speakers, entertainers and sponsors to con-

tinue their support of our organization; and indications of many of the other impediments to our fund-raising activities referred to in the complaint and in Dr. Barsky's affidavit.

The recent decision of the Bureau of Internal Revenue "to strip tax exemption from" our organization because it was on the Attorney General's list (see report in New York Times, February 3, 1948, p. 21, copy of which is annexed hereto as Exhibit "1") is another blow to our fund-raising activities. As a result of that determination by the Bureau, contributors will, of course, be far less willing to contribute to the Joint Anti-Fascist Refugee Committee than they were in the past. The ruling of the Bureau of Internal Revenue, ensuing directly from the Attorney General's designation of the organization in his list, is sufficient by itself to sustain the contention of the Joint Anti-Fascist [fol. 27] Refugee Committee that the action of the defendants has caused the Joint Anti-Fascist Refugee Committee irreparable harm and injury.

In order that this Court might have a complete picture of the effect of the so-called "loyalty list" upon the Joint Anti-Fascist Refugee Committee, there are submitted together with my affidavit and that of Dr. Barsky, responses to a letter, a copy of which is attached hereto as Exhibit "2", which was sent to each of the local chapters of the Joint Anti-Fascist Refugee Committee, wherein the local chapters were requested to describe the effects that the listing of the Joint Anti-Fascist Refugee Committee had outside of New York. Most of the chapters reported that the effects were adverse and deleterious.

From Chicago it was reported that one local newspaper would not publish any releases of the Joint Anti-Fascist Refugee Committee; that it was becoming more difficult to get any publicity from other local newspapers; that prominent local supporters, sponsors and contributors were withdrawing support; that requests to remove names from the Joint Anti-Fascist Refugee Committee mailing lists were increasing; and that meeting places and hotels have been less accessible. (See copy of letter from Ruth Belmont attached as Exhibit "3".)

A telegram from the Executive Secretary of the Seattle, Washington, chapter of the Joint Anti-Fascist Refugee Committee states that many contributors now refuse to

make any further contributions, others ask that their names be removed permanently from the mailing lists of the Joint Anti-Fascist Refugee Committee, and still others decline to attend Joint Anti-Fascist Refugee Committee affairs. (See copy of telegram from Bonnie Bird Gundlach attached as Exhibit "4".)

The chapter of the Joint Anti-Fascist Refugee Committee in San Francisco, California, has noted increasing requests from contributors that their names be removed from the Joint Anti-Fascist Refugee Committee mailing list; the re-[fol. 28] fusals by a local of the United Public Workers, which had formerly supported the Joint Anti-Fascist Refugee Committee, to send delegates to a Work Conference scheduled by the Joint Anti-Fascist Committee for February 8, 1948, because they deemed it unwise to support a listed organization; refusals by federal employees to continue as volunteer workers for the Joint Anti-Fascist Refugee Committee; withdrawals of support by aliens who did so reluctantly, but for their own safety; and the refusal of Erika Mann to make an appearance for the Joint Anti-Fascist Refugee Committee because she felt that the fact that the Joint Anti-Fascist Refugee Committee was a designated organization made it impossible for her to consider helping the joint Anti-Fascist Refugee Committee at this time. (See copy of letter from Faith Craig attached as Exhibit "5".)

The Philadelphia chapter of the Joint Anti-Fascist Refugee Committee relates a single consequence of the Attorney General's list which alone may result in a loss of many thousands of dollars to the Joint Anti-Fascist Refugee Committee for the year of 1948. According to a letter sent by Golda Kleiner (copy of which is attached as Exhibit "6-A"), the Department of Welfare of Pennsylvania has refused to issue the local chapter a permit to solicit funds because the Joint Anti-Fascist Refugee Committee was among the organizations listed by the Attorney General (see copy of denial of application, attached as Exhibit "6-B"; and copy of letter sent to Louis F. McCabe by Mrs. Henrietta Wolfson stating reasons for denial, attached as Exhibit "6-C"). Unable to conduct any fund-raising campaigns and forced to cancel several tentative dates, the local and regional fund-raising activities of the Philadelphia chapter may be considered terminated for 1948 as a result of the Attorney General's list.

The Boston chapter of the Joint Anti-Fascist Refugee Committee writes that as a result of the Attorney General's list "the damage done to its fund-raising work for Spanish [fol.29] refugees has been most serious". (See copy of letter from Jacqueline Steiner attached as Exhibit "7-A" and copy of report enclosed in that letter attached as Exhibit "7-B"). According to the executive secretary of that chapter, sometime during the middle of January, 1948, Judge Lawrence G. Brooks was nominated for the Presiding Judgeship of the Malden District Court but that nomination was postponed in the Massachusetts Executive Council partly because Judge Brooks had been a sponsor of the Joint Anti-Fascist Refugee Committee and had chaired a meeting of the Joint Anti-Fascist Refugee Committee in Boston in August, 1947.

On January 28, 1948, Judge Brooks wrote to Miss Steiner resigning as a sponsor because "it may be incongruous for a judge of a State Court to endorse a branch of an organization which has been included by the Attorney General of the United States in a list of so-called subversive groups", although he had "seen no evidences of subversive activities on the part of the Committee and (had) no reasons to think that they have been guilty of any." This decision Judge Brooks released to the Boston newspapers at the same time, again indicating that he was motivated by the fact that the Joint Anti-Fascist Refugee Committee was on the Attorney General's list. On January 29, 1948, the day after his resignation, his nomination as Presiding Judge was confirmed.

The Judge Brooks incident had a damaging by-product since on January 29, 1948, without any notification to the Joint Anti-Fascist Refugee Committee, the Boston City Club issued a statement to the press cancelling a dinner scheduled there for February 6, 1948 by the Joint Anti-Fascist Refugee Committee as the major fund-raising event of the year for the Boston chapter (see clipping from Boston Traveler, dated January 29, 1948, a copy of which is attached as Exhibit "7-C"). The paper which informed the Joint Anti-Fascist Refugee Committee of the cancellation also telephone listed sponsors of the Joint Anti-Fascist [fol.30] Refugee Committee and as a result four resignations, in addition to that of Judge Brooks, were received by the Boston Chapter. That chapter concludes that the foregoing is "Not only . . . likely to cause further resignations and withdrawals of support from its work, but also

the money, time, and effort which must perforce be spent in answering the attacks upon it constitute a direct loss for the valiant and needy people whom it serves."

Here in New York, I have witnessed several incidents which have occurred since December 4, 1947, which vividly demonstrate that the publication of the Attorney General's list jeopardizes the Joint Anti-Fascist Refugee Committee.

A graphic illustration of the effect of the publication of the Attorney General's list upon the Joint Anti-Fascist Refugee Committee is an incident which occurred recently in connection with a Joint Anti-Fascist Refugee Committee dance planned for December 13, 1947 in Westchester.

A member of the local committee of the Joint Anti-Fascist Refugee Committee in Westchester arranged in November of 1947 for the use of the Gedney Country Club on the evening of December 13, 1947. The reservation was made with a Mr. Lewis, the owner of the Gedney Country Club. A \$50 check for the rental of the Club was sent in accordance with the arrangements. The Attorney General's list was published on December 4th. On December 6th, some of the members of the local committee checked with Mr. Lewis on the arrangements for December 13th. At that time, Mr. Lewis said nothing as to cancelling our reservation. But on Monday, December 8th, less than a week before the event was scheduled, it was learned that Mr. Lewis was going to cancel the reservation and return the check. The Board of Directors of the Club had met on Sunday, December 7th, and wanted the option withdrawn.

The local committee met on that same day to make plans to find another place. Several individuals who were requested to make their homes available refused because they [fol. 31] were fearful of vandalism. Consequently, on December 9th, the Lawrence Inn, which is a road house off the Boston Post Road in Mamaroneck, was contacted to attempt to rent the road house for the affair. The owner of the place said he was not afraid, and said he would permit us to hold the affair there. A deposit of \$50.00 was left with him.

The next morning, a local committee member tried to arrange for a paid ad in the local paper, The Reporter Dispatch. This request was refused, and the editor, Mr. Carroll informed us that he would not take any money from us "until we were cleared on the Tom Clark list".

On December 10th, a telegram was received from the Lawrence Inn stating there was some mistake about the

date and that the Inn was not available for December 13. We subsequently learned that Mr. Carroll had called the owner of the Lawrence Inn and brought pressure to bear on him.

On December 11th, The Siwanoy Hotel was contacted. The owner was informed of what had transpired and he agreed to rent us the ballroom at the Siwanoy for December 13th. We paid him \$50.00 in advance. He was thereafter called by Mr. Carroll, and various other individuals, urging him to cancel our reservations, but he refused to do so.

On December 12th, one of the members of the local committee called to report a rumor that we were going to be picketed by the Catholic War Veterans and American Legion, and the police were therefore called for protection. In response, we were informed that we needed no protection because no affair was being held since the owner of the Siwanoy had no license to run a dance. There had, however, been dances there every Saturday night.

The affair was held as scheduled on Saturday night, December 13th. There were no pickets present, but there were detectives and newspaper reporters. The police permitted no dancing at all and informed us that they would give us [fol. 32] a ticket if anyone got up to dance. The newspaper account of the dance appeared in the local press on Monday, December 15, 1947, and is attached as Exhibit "8".

Only about 200 people attended the dance. I estimate that if the affair had been held at the Gedney Country Club, we would have had at least 300 people. Moreover, the owner of the Siwanoy had no liquor license, so everyone went out and bought their own liquor. The Joint Anti-Fascist Refugee Committee collected a total of \$1,700 that evening, although we had reasonably expected \$2,500 to \$3,000 to be collected at the Gedney Country Club.

Thus, at least five civil service workers have personally requested that their names be taken from our mailing and calling lists since the publication of the Attorney General's so-called "loyalty list". In each of these instances, the individuals concerned indicated a grave anxiety as to the fact that their names were on our mailing and calling list. Each of them stayed in the office until they actually saw the cards removed from the mailing list file and destroyed. Each of these requests were made in person by

civil service workers who had previously been constant contributors and in each instance it was expressly stated that the request was made as a result of the publication of the Attorney General's list.

During recent telephone campaigns, I found that several of the people called were antagonistic. These campaigns were conducted to invite patrons of the Joint Anti-Fascist Refugee Committee to a performance of "The Cradle Will Rock", to be held on January 11, 1948, and a Dance Festival for January 25, 1948. Invitations had been sent out to our regular theater list announcing the two events, and the office then proceeded to telephone the invitees to find out who is coming, who want tickets, etc. The technical staff, in making the telephone calls, reported that they were getting very poor response. Although all those called had been steady contributors, many were abusive, saying they wanted nothing to do with our organization; and some said [fol. 33] they were no longer interested in the organization and wanted their names removed from the mailing and calling list. There were at least fifty such cases of contributors who had been on the list for years.

Another incident involved the use of the Concourse Plaza Hotel in the Bronx for a scheduled event of the Joint Anti-Fascist Refugee Committee.

During 1947, we had used the Concourse Plaza Hotel three times; twice for rallies and once for a concert. On or about December 17, 1947, a member of the local committee running the concert called and said that the American Legion and Catholic War Veterans had threatened to picket, but since the Concourse Plaza had a contract with us, the affair was held and we had a successful concert.

The full effect of the Attorney General's list became apparent when, on January 19, 1948, the Concourse Plaza was called for a small room for a meeting. Mr. Lynch, assistant manager of the Banquet Department, said, "Just a minute"; then he returned several minutes later and said they were no longer going to rent to us because we were on the "loyalty list", and were a "subsidiary organization". We have been thereafter unable to rent space from that hotel.

The plain fact is that even the short time which has elapsed since December 4, 1947 demonstrates the urgency for relief by this Court. The tide which has been unloosed

by the Attorney General's list threatens the imminent destruction of the Joint Anti-Fascist Refugee Committee. Only a judicial determination of the unconstitutionality of the acts of the defendants can serve to mitigate and, possibly, eradicate the effects of Executive Order #9835 and the legislation from which it stems. The immediate and irreparable harm to the Joint Anti-Fascist Refugee Committee caused by the acts of the defendants, and the unconstitutionality of those acts, should compel this Court [fol. 34] to grant the Joint Anti-Fascist Refugee Committee the temporary injunction it seeks.

Helen R. Bryan.

Sworn to before me this 9th day of February, 1948.
David Berger, Notary Public, State of New York.
Residing in Westchester County. Cert. filed in
N. Y. Co. No. 791, Reg. No. 634-B-9. Commission
expires March 30, 1949.

[fol. 34] IN UNITED STATES DISTRICT COURT

DEFENDANTS' MOTION TO DISMISS THE COMPLAINT—Filed
March 13, 1948

Now come the defendants and move the Court to dismiss this action on the grounds that:

1. There is no present justiciable controversy between the parties hereto;
2. The complaint fails to state a claim against the defendants upon which relief can be granted.

In support of this motion, the Court is respectfully referred to defendants' supplemental memorandum of points and authorities attached hereto.

H. G. Morison, Assistant Attorney General; George Morris Fay, United States Attorney; Edward H. Hickey, Special Assistant to the Attorney General.

[fol. 35] IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION TO DISMISS—Filed June 4, 1948

And Now, this 4th day of June, 1948, this matter having come on for hearing upon the plaintiff's motion for a pre-

liminary injunction and the defendants' motion to dismiss the complaint; and the Court herein having considered the affidavits, exhibits, and memoranda of points and authorities submitted by the parties and the arguments of counsel; and thereupon it is Ordered, Adjudged, and Decreed:

First: That the motion of the defendants to dismiss the complaint be and it is hereby granted; and that the complaint be and hereby is dismissed.

Second: That the plaintiff's motion for a preliminary injunction be and it is hereby denied.

F. Dickinson Lettis, Justice.

Seen: O. John Rogge, Attorney for Plaintiff; Edward H. Hickey, Special Assistant to the Attorney-General, Attorney for Defendants.

[fol. 36] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10002

JOINT ANTI-FASCIST REFUGEE COMMITTEE, Appellant

v.

TOM C. CLARK, Attorney General of the United States, et al.,
Appellees

Appeal from the District Court of the United States for the District of Columbia (now United States District Court for the District of Columbia).

Argued March 16, 1949. Decided August 11, 1949

Mr. O. John Rogge, with whom *Messrs. Murray A. Gordon* and *Robert H. Goldman* were on the brief, and *Mr. Benedict Wolf*, for appellant.

Mr. Edward H. Hickey, Special Assistant to the Attorney General with whom *Messrs. H. G. Morison*, Assistant Attorney General, *George Morris Fay*, United States Attorney, and *Richard E. Guggenheim*, Attorney, Department of Justice, were on the brief, for appellees.

Messrs. Carl W. Berueffy, *Osmond K. Fraenkel* and *James L. Fry* were on the brief for the American Civil Liberties Union as *amicus curiae*, urging reversal.

Before Edgerton, Clark and Proctor, JJ.

OPINION

PROCTOR, J.; This appeal is from an order of the District Court dismissing the complaint of the Joint Anti-Fascist Refugee Committee, appellant, (an unincorporated association alleged to be engaged in raising and distributing funds for relief of anti-fascist refugees) hereafter referred to as Committee, against Tom C. Clark, as Attorney General of the United States, Seth W. Richardson, as Chairman of the Loyalty Review Board of the United States Civil Service Commission, and other named members of said Board, hereafter referred to as Board.

The complaint is based upon the action of the Attorney General, without notice or hearing, in designating the Committee as an organization falling under Part III, Section 3, of Executive Order 9835 (12 Fed. Reg. 1935, March 21, 1947), and listing its name as such in a letter to the Board, and the action of the Board in distributing the letter [fol. 37] and list to departments and agencies in the executive branch of the Government and releasing the same to the public press. The foregoing steps were taken pursuant to directions of the President in said Executive Order 9835. The declared purpose of this order is to assure the employment of persons loyal to the United States. To that end it prescribes detailed procedures for the administration of an employees loyalty program in the executive branch of the Government, involving investigation of officers and employees therein and applicants for employment. The order recites that it is based upon authority vested in the President by the Constitution and statutes, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and Section 9A of the Hatch Act, approved August 2, 1939 (18 U. S. C. 61i, now 5 U. S. C. 118j) and by authority of the President as Chief Executive of the United States, in the interests of the internal management of the Government. Section 9A of the Hatch Act provides:

"(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress; to have membership in any political party or organization which advocates the overthrow of our Constitutional form of government in the United States.

"(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person."

Part III, Section 3, of the order provides that the Board shall currently be furnished by the Department of Justice with the name of each organization "which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means." By subsection "a" Part III, Sec. 3, the Board is directed to "disseminate such information to all departments and agencies." The order further provides that among activities and associations of an applicant or employee, which may be considered in determining disloyalty, are membership in, affiliation with or sympathetic association with any of the organizations designated by the Attorney General. (Executive Order 9835, Part V, Sec. 2, f.) In his letter to the Board the Attorney General, in designating the Committee classified it under Part III, Section 3, of the Executive Order. For brevity, we refer to the several groups indicated therein under the general term "subversive," although the Attorney General did not specifically so designate the Committee. In the foregoing letter, the Attorney General reiterates an admonition by the President that membership in or association with a designated organization "is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case." The complaint contains no express denial that the Committee falls within the designation made by the Attorney General. In view of the extraordinary relief sought by way of equity a denial would seem to be appropriate. This is, in no sense, a simple action for libel.

The gist of the complaint is that Section 9A of the Hatch Act, "as applied by" the Executive Order, and the order itself are unconstitutional, and that the actions of the At-

torney General in designating and listing the Committee as subversive, and of Richardson in disseminating and publishing the list have caused the Committee to suffer loss of reputation and "business and patronage," including contributions from former and potential contributors, especially present and prospective civil servants; also to be deprived of its tax exempt status as a charitable organization; to be refused necessary licenses to solicit funds; to be hampered in obtaining places and supporters to carry on its fund-raising activities, and its "members and others" to be disgraced to their "economic injury," and discouraged in continuing their activities in its behalf, all to its irreparable damage. Those are the only direct allegations of damage or loss of rights suffered by the Committee. Nevertheless the complaint goes on to charge that the foregoing actions of defendants were "without warrant in law and amount to a deprivation of the rights of the plaintiff in violation of the Constitution . . ." and that Section 9A of the Hatch Act is void as applied by Executive Order 9835, because a deprivation of freedom of speech, of the press and of assembly and "association" (1st Amendment), of reserved rights of the people (9th and 10th Amendments) and of liberty and property without due process of law (5th Amendment). Wherefore, the Committee seeks a judgment declaring Section 9A of the Hatch Act, "as applied by Executive order #9835," and the order itself, to be unconstitutional; also for broad injunctive relief to annul the alleged illegal acts of the Attorney General and the Board and overcome their ill effects. The motion to dismiss is laid upon the ground that the complaint fails to state a justiciable controversy or a claim upon which relief can be granted.

We are convinced that the complaint does not present a justiciable controversy. The Executive Order imposes no obligation or restraint upon the Committee. It commands nothing of the Committee. It denies the Committee no authority, privilege, immunity or license. It subjects the Committee to no liability, civil or criminal. Cf. *United States v. Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309, 310, 71 L. Ed. 651 (1927). Nor does the designation by the Attorney General have any such effect. His letter to the Board simply complies with the directions of the President in whose behalf he was acting. He has done for the President only that which the President could have done for himself. Had the President done so his action would have

been within the realm of his executive power, not subject to judicial review. *Marbury v. Madison*, 5 U. S. (1 Cranch) 137, 164-166, 2 L. Ed. 60 (1803); *Keim v. United States*, 177 U. S. 290, 293, 44 L. Ed. 774 (1900); *Humphrey's Executor v. United States*, 295 U. S. 602, 629-630, 79 L. Ed. 1611 (1935).

The letter of the Attorney General and his list of designated organizations were furnished the Board only by way of information and advice. That is made clear by the terms of the Executive Order and the letter of the Attorney General. They cannot be put in the category of laws or [fol. 39] regulations within the meaning of constitutional prohibitions against abridgment of the rights of the people. The case is much like that of *Standard Scale Company v. Farrell*, 249 U. S. 571, 63 L. Ed. 780 (1919), where an injunction was sought against issuing certain scale specifications, injurious to plaintiff's business, upon the claim that it would constitute an invalid exercise of police power and violate constitutional rights and privileges. In upholding dismissal of the bill, the Court says (p. 575):

"The information given in the 'specifications' complained of may, as the plaintiff contends, be incorrect, the instruction may be unsound, and, if it is so, may be mischievous and seriously damage the property rights of innocent persons. But the opinions and advice, even of those in authority, are not a law or regulation such as comes within the scope of the several provisions of the Federal Constitution designed to secure the rights of citizens as against action by the States."

See also *United States v. Los Angeles & S. L. R. Co.*, *supra*. In *Employers Group, etc., v. National War Labor Board*, 143 F. 2d 145, 79 U. S. App. D. C. 105 (1944), where it was sought to annul and enjoin a "directive order" of said Board, this court, speaking through Judge Edgerton, said:

"No money, property, or opportunity has been taken or withheld from the appellants, and no one threatens any such act. No one threatens, and no one could maintain, either judicial or administrative proceedings against the appellants upon the authority of the Board's order." (p. 147)

"Any action of the Board would be informative and 'at most, advisory.' Appellants' demand that we annul and enjoin the Board's order therefore amounts to a demand that we prevent the Board from giving the President advice which appellants contend would be erroneous. A court might as well be asked to prevent the Secretary of State or the Attorney General from giving alleged erroneous advice. The correctness of administrative advice cannot be reviewed by the courts. They have neither the necessary authority nor the necessary qualifications for such work." (p. 151)

citing *Standard Scale Company v. Farrell*, *supra*. See also *National War Labor Board v. United States Gypsum Co.*, 145 F. 2d 97, 79 U. S. App. D. C. 239 (1944).

At most, any injury to the Committee is indirect—purely incidental to the objects and purposes of the loyalty program. Under these circumstances neither the Attorney General nor the Board can be restrained from carrying out the directions of the President looking to distribution of the information to interested departments and agencies—steps essential in carrying out the program.

The complaint that the information was disclosed to the public press presents no legal ground for relief. In the absence of a statute imposing secrecy, it cannot be supposed that the courts have any power to regulate or control publication of matters concerning the government's business. The responsibility and decision in each case must rest with the official in charge.

[fol. 40] The contention that without a hearing in connection with the Attorney General's investigation and determination the Committee has been denied due process of law, disregards the purpose and effect of the Executive Order and the action of the Attorney General. They were not aimed at the Committee, but were necessary steps in executing the law and carrying out the loyalty program. It is not unusual for official action, intended for one purpose, to affect adversely others against whom it is not directed. But these unavoidable consequences cannot stay the hand of government. They afford no ground for judicial review. *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 84 L. Ed. 1108 (1940); *Ex-Cell-O Corp. v. City of Chicago*, 115 F. 2d 627 (C. C. A. 7th 1940).

If the Committee means to assert claims in behalf of its members reputedly disgraced by reason of the designation, it is enough to point out that only the members themselves are entitled to complain of any personal injuries they may suffer. Likewise, only the members, not the Committee, can seek redress for alleged impairment of members' constitutional rights of freedom of speech and assembly. Those rights are personal to the individual members. Cf. *Hague v. C. I. O.*, 307 U. S. 496, 527, 83 L. Ed. 1423 (1939); *Northwestern Life Ins. Co. v. Riggs*, 203 U. S. 243, 255, 51 L. Ed. 168 (1906); *Western Turf Assn. v. Greenberg*, 204 U. S. 359, 363, 51 L. Ed. 520 (1907). The Committee's declared purposes are altogether charitable, which would give it no authority to assert or protect constitutional liberties and privileges of its individual members.

Obviously, nothing here complained of legally affects the tax or licensing status of the Committee. No declaration or mandate in this case could operate legally upon such matters. The Committee's recourse lies with the officials or the courts clothed with power to grant direct relief.

Holding, as we do, that no case has been stated for injunctive relief, it follows in the circumstances presented by the complaint that there is no ground to justify a declaratory judgment such as the Committee asks. *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249, 262, 77 L. Ed. 730 (1933); *Colegrove v. Green*, 328 U. S. 549, 552, 90 L. Ed. 1432 (1946).

We might rest our opinion here, without dealing with the constitutional questions raised. However, in view of the number of cases in this jurisdiction attacking validity of the loyalty program, it seems proper to dispose of questions of that nature which have been argued in this case. Therefore, we shall briefly state our views.

We do not doubt validity of Section 9A of the Hatch Act. Congress may prescribe qualifications of government employees and attach conditions to their employment. *Friedman v. Schwellenbach*, 159 F. 2d 22, 24, 81 U. S. App. D. C. 365 (1946), cert. denied 330 U. S. 838.

We do not doubt validity of the Executive Order. It is the President's duty to take care that the laws are faithfully executed. *Article II, Section 3, Constitution*. It is his right and his duty to protect and defend the government against subversive forces which may seek to change or destroy it by unconstitutional means. Vesting of the

executive power in the President is essentially a grant of power to execute the laws. He cannot do so alone. He must have the aid of subordinates. Therefore, he must have the power to select others to act for him, under his direction, in executing the laws. *Myers v. United States*, [fol. 41] 272 U. S. 52, 117, 71 L. Ed. 160 (1926). The Executive Order exhibits a proper effort by the President to carry out the provisions of Section 9A. It is an exercise of his power as head of the executive branch of government to protect the civil service from disloyal and subversive elements. See Corwin, *The President—Office and Powers*, 3rd Ed. (1948), 121-136. His directions contained in the Executive Order lay down the method he has chosen to discharge his duty in carrying out the objects and purposes of Section 9A and the Civil Service Act.

We do not doubt validity of the Attorney General's Act. Had the President performed the task himself, his acts could not have been challenged legally. *Marbury v. Madison*; *Keim v. United States*; *Humphrey's Executor v. United States*, *supra*. The fact that they were done by the Attorney General, for and at the President's direction, does not change their essential character as acts of the President himself.

Contrary to the contentions of the Committee, nothing in the Hatch Act or the loyalty program deprives the Committee or its members of any property rights. Freedom of speech and assembly is denied no one. Freedom of thought and belief is not impaired. Anyone is free to join the Committee and give it his support and encouragement. Everyone has a constitutional right to do these things, but no one has a constitutional right to be a government employee.

The order of the District Court dismissing the complaint is affirmed.

DISSENTING OPINION

EDGERTON, J., dissenting: The facts have not been tried and we know nothing about them. Appellant may be charitable as it says or subversive as appellees' ruling says. By moving to dismiss appellant's complaint on the ground it did not state a justiciable controversy or a claim on which relief could be granted, appellees elected to try only

the sufficiency and not the truth of appellant's statements of fact. Since the District Court granted the motion to dismiss, appellant's statements must be assumed to be true for purposes of this appeal. No other facts are before us.

According to appellant's complaint: "Plaintiff, an unincorporated association located in the City and State of New York, is a charitable organization engaged in relief work. . . . The aims and purposes of the plaintiff organization are to raise, administer and distribute funds for the relief and rehabilitation of Spanish Republicans in 'exile and other anti-fascist refugees who fought in the war against Franco. Before the end of the war in Europe, this relief consisted of: (1) the release and assistance of those of the aforesaid refugees who were in concentration camps in Vichy France, North Africa and other countries; (2) transportation and asylum for those of the aforesaid refugees in flight; (3) direct relief and aid, to those of the aforesaid refugees requiring help, through the Red Cross and other international agencies. At the present time, the Joint Anti-Fascist Refugee Committee relief work is principally devoted to aiding those Spanish Republican refugees, and other anti-fascist refugees who fought against Franco, located in France and Mexico. Pursuant to its aims and purposes, the plaintiff organization has, from its inception in 1942 through the end of 1947, disbursed a [fol. 42] total of \$1,011,448.00 in cash and \$217,903.00 in kind for the relief of anti-fascist refugees and their families. The relief included money, food, shelter, educational facilities, medical treatment and supplies, and clothing to recipients in France, North Africa, the Dominican Republic, Portugal, Switzerland, Cuba, Venezuela, Mexico, the Netherlands, Spain and the United States.

"By means of voluntary and paid assistance, the plaintiff organization has raised funds from contributors at social affairs, rallies, meetings, dinners, theatre parties, etc. In order to carry on the aforesaid work, plaintiff has built up and is dependent upon the continued good will of the people of the United States and upon the continued maintenance of its reputation of engaging in relief work for the benefit of anti-fascist refugees."

According to the complaint: the appellees, purporting to act under an Executive Order, have issued for the guidance of government officials in employing and discharging

employees a ruling that the appellant is "subversive".¹ They issued this ruling without giving appellant any notice or hearing. They gave it wide publicity. It has caused appellant to lose reputation, members, supporters, contributions from government employees and others, valuable privileges, speakers, and meeting places. It has caused appellant's members to be subjected to ridicule, obloquy and economic loss.

However indefinite the word "subversive" may be, it is more or less synonymous with "disloyal". It is highly defamatory. No common meaning of the term fits the appellant if the appellant's "aims and purposes" are what it says they are. In other words, if the complaint is true the appellant is not subversive. Whatever the actual facts may ultimately prove to be, it must be assumed for purposes of this appeal that appellees' ruling is not only damaging but contrary to fact.²

¹ The official announcement in 13 Fed. Reg. 1471, 1473, March 20, 1948, says: "The first group [of organizations] is reported as having been previously named as subversive by the Department of Justice . . . Under Part III, section 3, of Executive Order No. 9835, the following additional organizations are designated. . . . Joint Anti-Fascist Refugee Committee."

Some months after this suit was filed, appellees issued and published a ruling that appellant is "communist". 13 Fed. Reg. 6137, Oct. 21, 1948.

² It is immaterial that, as the opinion of the court points out, the complaint "contains no express denial that the Committee falls within the designation." If the complaint did not, as it does, contain a denial by necessary implication, that also would be immaterial. No complaint based on defamatory words need allege that the words are false; it is for the defendant to allege and prove, if he can, that they are true. And regardless of the nature of the suit, things not asserted or admitted in the complaint cannot be treated as true on the present appeal even if they are not denied in the complaint.

If appellees had described appellant as "totalitarian, fascist, communist, or subversive . . .," and not specifically as "subversive", the difference would be immaterial, since either description is defamatory and, on this record, contrary to fact.

I. *The Executive Order.* Executive Order No. 9835³ on which appellees rely, provides in Part V that: "1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

[fol. 43] "2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following: . . . f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means." 12 Fed. Reg. 1935, 1938.

An organization of the aims and purposes asserted in the complaint is not "subversive" within the meaning of that term in the Executive Order. Whatever it means in other connections, in this connection the term describes organizations "sympathetic association" with which may be evidence "that the person involved is disloyal to the Government of the United States." Advocacy of revolution is disloyal to the government. Greater or equal loyalty to a foreign government is disloyal to the government of the United States. Nothing less is. Helping former Spanish Republicans is not evidence of disloyalty to the government of the United States.⁴ A charitable organization such as the appellant must now be assumed to be is therefore not subversive in the sense in which the word is used in the Executive Order. Neither is it "totalitarian, fascist, communist, . . ." or otherwise within the Order. On the present record, the Order does not justify appellees' ruling.

³ 12 Fed. Reg. 1935 (1947).

⁴ It does not even oppose any known policy of the government. There is, moreover, nothing disloyal to the government in opposition to a known government policy. Practically any given government policy is opposed by many members of Congress.

The Order fails for another reason to justify the ruling. The Order provides (Part III, § 3) that "The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, *after appropriate investigation* and determination, designates as totalitarian, fascist, communist or subversive . . ."⁵ (Emphasis added.) An investigation that may result in the making and publication of a defamatory ruling which limits employment throughout the government service, limits the freedom of government employees, and harms not only the appellant but many persons outside as well as within the service, is not appropriate unless it conforms to basic standards of fairness. These include notice and a hearing. If the complaint is true, appellant was given none.

Appellees' ruling is not only outside the Executive Order but outside the authority on which the Order is said to rest. Section 9A of the Hatch Act, 53 Stat. 1148, 18 U. S. C. 61 i, forbids employment of members of an organization that "advocates the overthrow of our constitutional form of government in the United States." If the facts alleged in the complaint are true the appellant is not such an organization. The Civil Service Act, R. S. § 1753, 5 U. S. C. 631, authorizes the President to "prescribe such regulations for the admission of persons into the civil service of the [fol. 44] United States as may best promote the efficiency thereof . . ." On the present record, appellees' ruling against appellant has no more tendency to promote the efficiency of the civil service than a similar ruling against the Republican party or the Methodist Church would have.⁶ Moreover, the ruling is invalid on constitutional grounds.

II. *Due process of law.* Arbitrary official action that inflicts damage takes liberty or property without due process of law. On this record, appellees' ruling is arbitrary because it is contrary to fact, because it is not authorized by law or Executive Order, because it has no tendency to benefit

⁵ *Supra* note 3, at 1938.

⁶ Since the ruling is not authorized by the Order, and is invalid for other reasons, we need not consider whether in our opinion the Order is valid; or whether the Administrative Procedure Act required a hearing.

the public service, and because it was made without notice and hearing.

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In re Oliver*, 333 U. S. 257, 273. These rights are not confined to proceedings in courts. In the *Morgan* case, which the Supreme Court cited as "among the multitude that support" the statement just quoted, the plaintiffs attacked an order of the Secretary of Agriculture fixing rates to be charged by market agencies. The Court said "the rudimentary requirements of fair play . . . demand 'a fair and open hearing'." *Morgan v. United States*, 304 U. S. 1, 14-15.

We were recently reminded that "due process of law has never been a term of fixed and invariable content. . . . The right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations." *Federal Communications Commission v. WJR, The Goodwill Station, Inc.*, 337 U. S. 265. "That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." *Betts v. Brady*, 316 U. S. 455, 462. What is practically necessary may be reasonably fair, and what is reasonably fair may be due process. It is not practical to require a public official to hold a hearing before he makes a casual damaging statement. But it is neither fair nor necessary to enact and publish a defamatory permanent regulation restricting eligibility for public employment, restricting the freedom of government employees, and inflicting damage on many persons, without giving the accused group an opportunity to be heard in its defense. The same circumstances that make the Attorney General's investigation less than appropriate make it less than due process of law.

III. *Freedom of speech and assembly.* Read literally, the First Amendment of the Constitution forbids only Congress to abridge these freedoms. But as the due process clause of the Fourteenth Amendment extends the prohibition to all

state action, the due process clause of the Fifth must extend it to all federal action.⁷

[fol. 45] According to the complaint, appellant uses meetings and speakers in raising funds. Appellees' ruling, in its context, is a public warning that sympathetic association with appellant may cause government employees to be dismissed. It therefore puts government employees, present and prospective, under economic and social pressure not to support any of appellant's activities, verbally or otherwise, and in particular to stay away from appellant's meetings. In other words the ruling restricts the freedom of speech and assembly of government employees. According to the complaint, the ruling has deprived appellant of speakers and meeting places as well as supporters and funds. In other words it has restricted appellant's freedom of speech and assembly. To restrict appellant is to restrict the members who compose it.

The Supreme Court has repeatedly held that restrictions on freedom of expression are not valid in the absence of a clear and present danger.⁸ There is no evidence of such a danger in this case. In the *Mitchell* case the Court held that "For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service."⁹ But if appellant's purposes are truly stated in the complaint, sympathetic association with appellant cannot reasonably be deemed to interfere with the efficiency of the public service. It follows that if, as we must

⁷ This was implied in *United Public Workers v. Mitchell*, 330 U. S. 75, 94-95.

⁸ The Court reaffirmed this doctrine in *Terminiello v. City of Chicago*, 337 U. S. 1.

⁹ *United Public Workers v. Mitchell*, 330 U. S. 75, 101. The Court upheld a particular restraint on the freedom of government employees to promote their political views but said (p. 100): "Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work." None would deny such limitations on congressional power."

now assume, the complaint is true, the restraint imposed upon government employees, and not merely that imposed upon appellant and its members, is unconstitutional.

Executive power to control public employment stands on no higher constitutional ground than legislative power to tax. The taxing power does not extend to sales of propaganda not made for profit; license taxes, though imposed for the legitimate purpose of raising revenue, are unconstitutional in their application to such sales.¹⁰ Such taxes, even if they are too small to be a "substantial clog"¹¹ on the circulation of propaganda, are "on their face . . . a restriction of the free exercise of those freedoms which are protected by the First Amendment."¹² The threat to reputation and livelihood that appellees' ruling imposes is on its face a greater restriction of the free exercise of those freedoms than the small license taxes the Supreme Court held void. It is a substantial clog. It is therefore more clearly unconstitutional than the taxes.

[fol. 46] IV. *Standing to sue.* Appellant, an unincorporated association,¹³ has standing to sue for the claimed injury to its reputation.¹⁴

¹⁰ *Jones v. City of Opelika*, 319 U. S. 103; *Murdock v. Commonwealth of Pennsylvania*, 319 U. S. 105; *Busey v. District of Columbia*, 319 U. S. 579; *Busey v. District of Columbia*, 78 U. S. App. D. C. 189, 138 F. 2d 592.

¹¹ *Jones v. City of Opelika*, 316 U. S. 584, 604. The dissent of Chief Justice Stone and the other dissents filed at the same time were afterwards adopted as opinions of the Court. *Jones v. City of Opelika*, 319 U. S. 103, 104.

¹² *Murdock v. Commonwealth of Pennsylvania*, 319 U. S. 105, 114.

¹³ An unincorporated association may sue in its common name. *Busby et al. v. Electric Utilities Employees Union*, 79 U. S. App. D. C. 336, 147 F. 2d 865; Rule 17(b), Fed. R. Civ. P.

¹⁴ *Kirkman et al. v. Westchester Newspapers*, 287 N. Y. 373, 39 N. E. 2d 919. Cf. *New York Society for the Suppression of Vice v. MacFadden Publications*, 260 N. Y. 167, 183 N. E. 284, 86 A. L. R. 440.

It is too late to say that equity does not protect personal rights *Berrien v. Pollitzer*, 83 U. S. App. D. C. 23, 165 F. 2d 21.

Appellant has standing to sue for the claimed impairment of its freedom of speech and assembly.

Appellant has standing to sue for its claimed loss of contributions. Even a charity, which appellant claims to be, cannot operate without funds. In *Pierce v. Society of Sisters* private schools, some of them charitable, got relief because a state law requiring children to attend public schools caused the plaintiffs to lose tuition fees. "Their interest is clear and immediate, within the rule approved in *Truax v. Raich* . . . and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers." *Pierce v. Society of Sisters*, 268 U. S. 510, 536. In *Truax v. Raich*, 239 U. S. 33, enforcement of a state law restricting the right of employers to hire aliens but not the right of aliens to work for hire was enjoined at the suit of an alien. In *Buchanan v. Warley*, 245 U. S. 60, an ordinance forbidding Negroes to move into white neighborhoods was set aside at the suit of a white man who wished to complete a sale to a Negro. In each case an unconstitutional interference with persons other than the plaintiff was enjoined because it put pressure on them to sever, or not to create, relations of value to him. Similarly the unconstitutional pressure of appellees' ruling upon present and prospective government servants has injured appellant by depriving it of contributions. Its relations with its contributors were terminable at will, but so were the relations involved in the *Pierce* and *Truax* cases.

Columbia Broadcasting System, Inc. v. United States, 316 U. S. 407, is in some respects still closer to this case. The Columbia network sued to set aside a Communications Commission regulation against renewing the licenses of broadcasting stations that had certain kinds of contracts with networks. The regulation, like the one now in suit, did not command or forbid any action, either by the plaintiff or by the plaintiff's affiliates. The regulation was "addressed only to the Commission." (p. 419) But it injured Columbia by putting stations affiliated with Columbia to the sort of choice to which appellees' ruling puts government employees affiliated with appellant; the stations could cancel their contracts or lose their licenses, as the employees can cancel their affiliations or endanger their jobs. The Supreme Court held that Columbia had standing to sue. It said (pp. 417, 418): "The regulations are

not any the less reviewable because their promulgation did not operate of their own force to deny or cancel a license. . . . The regulations are rules which in proceedings before the Commission require it to reject and authorize it to cancel licenses on the grounds specified in the regulations without more." The regulation now in suit is a rule which authorizes dismissal of employees on the grounds specified in the Executive Order.

Threatened publication by government officers of damaging information about a plaintiff, even when its truth is [fol. 47] conceded, gives him standing to test the propriety of the publication.¹⁵ There would seem to be no less standing where, as here, truth is not conceded and continuance rather than the first occurrence of the publication is threatened.¹⁶

V. *Liability to suit.* "Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, . . . courts have the power to grant relief against those actions."¹⁷ Equitable jurisdiction extends to cabinet officers.¹⁸ The theory that an officer who is or claims to be executing an order of the President cannot be restrained would end due process of law and

¹⁵ *Utah Fuel Co. v. National Bituminous Coal Commission*, 306 U. S. 56; *Bank of America National Trust & Savings Association v. Douglas*, 70 App. D. C. 221, 105 F. 2d 100.

¹⁶ The question whether government employees whom the ruling threatens with dismissal have standing to sue for that reason, cf. *United Public Workers v. Mitchell*, *supra* note 9, is not before us, for no employees are suing. It does not appear that any of appellant's members are government employees, although the complaint says appellant's "contributors" include "civil servants".

¹⁷ *Larson v. Domestic and Foreign Commerce Corp.*, U. S. , decided June 27, 1949. *Belt v. Hood*, 327 U. S. 678, 684; *Land v. Dollar*, 330 U. S. 731; *United States v. Lee*, 106 U. S. 196.

¹⁸ *Eg., Philadelphia Company v. Stimson*, 223 U. S. 605; *Ickes v. Fox*, 300 U. S. 82, 96-97; *Red Canyon Sheep Co. v. Ickes*, 69 App. D. C. 27, 98 F. 2d 308.

subject all life, liberty, and property to the will, or alleged will, of one man.

Cabinet officers are not liable in damages for statements made in connection with official duties, for they should be under no apprehension that personal harm might result from saying what they think they should say.¹⁹ But their liability in equity causes no such apprehension. No claim for injunctive or declaratory relief was involved in the *Spalding* and *Glass* cases on which appellees rely. No claim for damages is involved in this case.

The rule of *Standard Scale Co. v. Farrell*, 249 U. S. 571, that mere administrative advice cannot be reviewed by a court, is equally irrelevant here. Standard manufactured scales that did not agree with "specifications" published by a state Superintendent of Weights and Measures. Standard's bill to set aside the specifications was dismissed. No law or order required any inspector, purchasing officer, or other person to treat the specifications as correct; they were (p. 574) "at most, advisory." But Executive Order No. 9835 requires all loyalty boards to treat as correct appellees' ruling that appellant is subversive.²⁰ On March 9, 1948, the appellee Chairman of

¹⁹ "The head of a Department . . . cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress, and in respect of matters within his authority . . . In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages . . ." *Spalding v. Vilas*, 161 U. S. 483, 498. *Glass v. Ickes*, 73 App. D. C. 3, 117 F. 2d 273, cert. denied 311 U. S. 718, followed *Spalding v. Vilas*.

²⁰ Cf. *Shields v. Utah-Idaho Central Ry. Co.*, 305 U. S. 177, 182-184.

Additional differences between the *Standard Scale* case and the present one are (1) it was not even alleged there, and is admitted here, that the defendants acted without giving the plaintiff notice or hearing; (2) the complaint there was not dismissed until evidence had been taken, and this included proof that the specifications were "the

[fol. 48] the Loyalty Review Board called this fact to the attention of all executive departments and agencies.²¹

Employers Group of Motor Freight Carriers v. War Labor Board, 79 U. S. App. D. C. 105, 143 F. 2d 145, cert. denied 323 U. S. 735, applied the rule of the *Standard Scale* case. We declined to set aside a "directive order"

result of prolonged investigation and extensive experimentation"; (3) the specifications did not name the plaintiff but were "generic"; (4) no question of freedom of speech or assembly was involved.

Although the evidence, if any, of unreasonable or arbitrary action was obviously weak in the *Standard Scale* case the Court said: "If the 'specifications' had been issued as a regulation, that is, a law, we might have been called upon to inquire whether it was a proper exercise of the police power or was, as plaintiff contends, void because arbitrary and unreasonable." *Standard Scale Co. v. Farrell*, 249 U. S. 571, 577.

²¹ Two paragraphs of his Memorandum No. 2, which is addressed "To All Executive Departments and Agencies", follow:

"Since the loyalty program is being conducted under the authority of the executive order, and since the President under such order has constituted the Attorney General the agency for the creation and submission of a list of groups or organizations of the nature defined in Part V, subdivision f, of the executive order, the determination as to the nature of such organizations thus made by the Attorney General under the authority and direction of the President, must be accepted by all Boards for the purpose of all hearings and determinations under the loyalty program.

"Boards, therefore, should not enter upon any evidential investigation of the nature of any of the organizations identified in the Attorney General's list, for the purpose of attacking, contradicting, or modifying the controlling conclusion reached by the Attorney General in such list. Any and all questions proposed with respect to the merits or appropriateness of the inclusion of a particular organization in such list would, therefore, be for the Attorney General to decide, and not for the Board, and the Board should permit no evidence or argument before it on the point."

that amounted only to a statement that the Board thought the Carriers should grant certain wage increases. The Board's views were not enforceable against anybody,²² were not defamatory, and caused no loss. The ruling now in suit is defamatory; unless it is set aside, it is enforceable against appellant's supporters who are government employees; and it has caused loss.

Appellees' ruling is said to be a mere matter of internal management. Even in such matters the Constitution governs.²³ But there was nothing internal about the publication of the ruling. It was chiefly this publication that injured the appellant and its members and restricted the freedom of government employees. The right to hire and fire is not a right to broadcast statements that appellant, and so the members who compose it, are criminals or that they are subversive.

If the assertions of fact in the complaint are true the appellees' ruling is contrary to fact, unauthorized, and unconstitutional, and the appellant is entitled to relief against the appellees. The judgment dismissing the complaint should therefore be reversed.

²² The carriers suggested that the Board might notify the President of the plaintiffs' noncompliance with the Board's views and the President might take possession of the plaintiffs' property. But nothing the Board could say to the President could determine whether the Carriers should grant the proposed wage increases, or whether their property should be seized, or any other question. The President had full authority under his war powers to take possession of the plaintiffs' property or not to do so, whether or not he agreed with the Board's views, whether or not the Carriers complied with the Board's views, and whether or not the Board reported to the President. Any action the Board might take would therefore be merely advisory.

²³ Cf. *United Public Workers v. Mitchell*, *supra* note 9.

[fol. 49] [Stamp:] United States Court of Appeals for the District of Columbia, Circuit. Filed Aug. 11, 1949. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, APRIL TERM, 1949

No. 10002

JOINT ANTI-FASCIST REFUGEE COMMITTEE, AN UNINCORPORATED ASSOCIATION, Appellant,

vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES, Seth W. Richardson, Chairman of the Loyalty Review Board of the United States Civil Service Commission, et al., Appellees

Appeal from the District Court of the United States for the District of Columbia, now United States District Court for the District of Columbia.

Before: Edgerton, Clark and Proctor, JJ.

JUDGMENT

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, now United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Circuit Judge Proctor.

Dated August 11, 1949.

Dissenting opinion by Circuit Judge Edgerton.

[fol. 50] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Oct. 14, 1949. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, OCTOBER TERM, 1949

No. 10,002

JOINT ANTI-FASCIST REFUGEE COMMITTEE, Appellant,

v.

TOM C. CLARK, ET AL., Appellees

ORDER

On consideration of the appellant's motion to substitute J. Howard McGrath, present Attorney General of the United States, as a party appellee herein in the place and stead of appellee Tom C. Clark, who ceased to hold office as Attorney General of the United States on or about August 24, 1949, and it appearing to the Court that J. Howard McGrath, present Attorney General of the United States, consents to the said substitution, and appellant having alleged that J. Howard McGrath, present Attorney General of the United States, adopts and continues the actions of appellee Clark complained of in this cause and having alleged that there is substantial need for continuing and maintaining this cause and obtaining adjudication of the questions involved, It is

Ordered by the Court that J. Howard McGrath, Attorney General of the United States, be, and he is hereby, substituted as a party appellee herein in the place and stead of appellee Tom C. Clark.

Per curiam.

Dated October 14, 1949.

[fol. 51] PETITION FOR REHEARING—[Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Aug. 26, 1949. Joseph W. Stewart, Clerk

[fol. 52] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Sep. 22, 1949. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, APRIL TERM, 1949

No. 10,002

JOINT ANTI-FASCIST REFUGEE COMMITTEE, Appellant,

vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES,
ET AL., Appellees

Before: Edgerton, Clark and Proctor, JJ.

ORDER

On consideration of appellant's petition for rehearing in the above-entitled case and of appellees' objections thereto, It is

Ordered by the Court that the petition be, and it is hereby, denied.

Per Curiam.

Dated September 22, 1949.

[fol. 53] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Dec. 9, 1949. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Index No. 10,002

JOINT ANTI-FASCIST REFUGEE COMMITTEE, Appellant,
against

TOM C. CLARK, ET AL., Appellees

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the

United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint Appendix to briefs.
2. Opinion.
3. Judgment.
4. Order to substitute J. Howard McGrath for appellee Tom C. Clark.
5. Clerk's memorandum of filing of petition for rehearing.
6. Order denying petition for rehearing.
7. This designation.
8. Clerk's certificate.

Rogge, Fabricant, Gordon & Goldman, By G. John Rogge, Attorneys for Appellant, 401 Broadway, New York 13, N.Y.

[fol. 54]

CERTIFICATE OF SERVICE

I hereby certify that I have ~~this day~~ served a copy of the Designation of Record on Philip B. Perlman, Solicitor General of the United States, by mailing a copy to him at his office, Department of Justice, Washington, D. C.

O. John Rogge.

Dated at New York, N. Y., this 8th day of December, 1949.

[fol. 55] UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, formerly United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered 1 to 54, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties, and the proceedings of the said Court of Appeals, as designated by counsel, in the case of:

JOINT ANTI-FASCIST REFUGEE COMMITTEE, Appellant,

v.

TOM C. CLARK, ET AL., Appellees

No. 10,002, October Term, 1949, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this fourteenth day of December, A.D. 1949.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit.
(Seal.)

[fol. 56] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1949

No. —

JOINT ANTI-FASCIST REFUGEE COMMITTEE, AN UNINCORPORATED
ASSOCIATION, Petitioner,

v.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED
STATES, ET AL.

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION
FOR CERTIORARI

Upon consideration of the application of counsel for the petitioner,

It is ordered that the time for filing petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 25, 1950.

Fred M. Vinson, Chief Justice of the United States.

Dated this 12 day of December, 1949.

[fol. 54] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 13, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas and Mr. Justice Clark took no part in the consideration or decision of this application.

(7546)